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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 368, 369, 370

LOUIS H. ROSENBLUM,
Petitioner-Appellant Below,
vs.
UNITED STATES OF AMERICA,
Respondent-Appellee Below.

MAX STRYK,
Petitioner-Appellant Below,
vs.
UNITED STATES OF AMERICA,
Respondent-Appellee Below.

JACOB WEISS,
Petitioner-Appellant Below,
vs.
UNITED STATES OF AMERICA,
Respondent-Appellee Below.

SEPARATE AND SEVERAL REPLY BRIEF OF PETITIONERS.

ALBERT WARD,
PALMER K. WARD,
318 Insurance Bldg.,
Indianapolis, Indiana,
WILLIAM B. HARRELL,
Republic Bank Building,
Dallas, Texas,
Attorneys for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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SEPARATE AND SEVERAL REPLY BRIEF OF PETITIONERS.

This reply is directed first to the subject of "Questions Presented" on page 2 of the Government's Brief in Opposition, and the argument on such questions appearing on pages 13 to 21, inclusive; after which, reply will be made hereinbelow to the "Statement" as made in said brief on pages 4 to 13, inclusive.

QUESTIONS PRESENTED.

In stating the questions presented, and in argument thereof, the Government has not responded to the crucial points presented by the petitioners.

Question One.

On page 2 of its brief, the Government states question one to be, Whether there was a fatal variance between the charge contained in the indictment and the proof.

The Government's argument on this question on pages 13-16 is too confined in that it says petitioners' complain merely of the allegation describing the nature of the income which they failed to report. It is then said on page 15, that "Had this allegation which itemized gross income been eliminated, the indictment would still have sufficiently charged a violation of Section 145(b), Internal Revenue Code". The Government relies on *Cave* v. *United States*, 159 F. 2d 464 (8th C. A.), certiorari denied, 331 U. S. 847, to support this statement. The *Cave* case does not support the contention of the Government, as the question there was whether the indictment charged a violation of Section 145(a) or 145(b).

However, in *Singer* v. *United States*, 58 F. 2d 74, the Third Circuit decided that itemization of gross income was an essential element of an indictment; there is, therefore, a conflict between the decision of the Seventh and Eighth Circuits, and that of the Third Circuit, upon this material question; and the decision of the Seventh Circuit in our cases is in conflict with the applicable decisions of the Supreme Court in *Cole* v. *Arkansas*, 333 U. S. 196;

DeJonge v. *State of Oregon*, 299 U. S. 353; *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Carll*, 105 U. S. 611; *United States* v. *Hess*, 124 U. S. 483; *United States* v. *Britton*, 107 U. S. 655; *Spies* v. *United States*, 317 U. S. 492, 499. (Pet. 16.)

On page 15 of its brief the Government states that "The allegations with respect to gross income were in effect surplusage". The Government relies on *Hall* v. *United States*, 168 U. S. 632; *Glover* v. *United States*, 125 F. 2d 291 (C. A. 5th), certiorari denied, 316 U. S. 690; *Leche* v. *United States*, 118 F. 2d 246 (C. A. 5th) certiorari denied, 314 U. S. 617, rehearing denied, 314 U. S. 712, to support its theory that such allegations were *in effect* surplusage. It should be observed that this position of the Government is equivocal, and the Government itself is in doubt as to whether such allegations are surplusage, and it has made no effort to answer petitioners' contention that such allegations became very prejudicial to the substantial rights of the petitioners as set out in paragraph B, pages 17 and 18 of their petition.

The *Hall* case, *supra*, is not similar; in that case, the indictment contained all of the essential statutory allegations involved in the offense charged; it further contained an allegation which was no part of the offense; the Court decided that under such circumstances, the allegations which formed no part of the offense charged need not be proved; that the character of the offense, as provided by the statute, was not changed by the unnecessary averment. In our cases, the allegation as to the break-down of gross income was an essential part of the offense charged, and the *Hall* case is clearly distinguished.

But if it is held that such break-down was not necessary, then the allegation as to such break-down falls within the class of cases which hold that where such allegations are made as being descriptive *of the manner* in which the

alleged offense was committed, they must be proved as alleged. *Hall* v. *United States,* 168 U. S. 632, 639.

Glover v. *United States,* 125 F. 2d 291 (5 C. A.) and *Leche* v. *United States,* 118 F. 2d 246 (5 C. A.), are mail fraud cases, and are not analogous to the question here presented; in the *Glover* case, Circuit Judge Hutcheson filed a very strong dissenting opinion upon the importance of essential allegations in an indictment.

If it can be held that these cases of the Fifth Circuit do decide that such allegations were surplusage, then such decisions and the decision of the Seventh Circuit in our cases, are in conflict with the Third Circuit in the cases of *Singer* v. *United States,* 58 F. 2d 74 (3rd C. A.), and *Kutler* v. *United States,* 79 F. 2d 440, 442 (3rd C. A.), on this question of fundamental law and criminal procedure which should be settled by a decision of this Court in the instant cases.

As was said by Judge Davis speaking for the Third Circuit in the case of *Kutler* v. *United States,* 79 F. 2d 440, at page 442

> "Where there is an allegation which describes, defines, qualifies, or limits a matter material to be charged, it is taken as a descriptive averment, and the general rule is that it must be proved as laid, even though such particularity of description was unnecessary. *Trice* v. *State,* 116 Ga. 602, 42 S. E. 1008; *United States* v. *Howard,* 26 Fed. Cas. 388, No. 15,403; *State* v. *Lashus,* 67 Me. 564; *State* v. *Langley,* 34 N. H. 529; *Commonwealth* v. *Dejardin,* 126 Mass. 46, 30 Am. Rep. 652."

To the same effect is *Hall* v. *United States,* 168 U. S. 632, 639.

Ours is such a case—corporate dividends were charged by the Grand Jury as having been received, upon which the charge of tax evasion is predicated.

On page 15 of its Brief, the Government says that

> "Had the indictment alleged a failure to report *corporate* dividends, there might be some basis for petitioners' argument."

It is to be noted that Section 145(b) under which the prosecution was had is part of the same statute which includes Section 115(a) defining the word "dividends". The crime, if any, was alleged to be a violation of the Internal Revenue Code, of which both the said sections are a part, and these sections are *in pari materia* and must be construed together. There can be no crime of tax evasion unless something that is commanded or defined in the statute was violated. Dividends has a fixed Congressional meaning and can mean only *corporate* dividends, as defined in said Section 115(a). The Government cannot go outside the statute itself and seek other sources by dictionary or common usage to give a statutory word a different meaning.

The Government concedes that petitioners' argument is sound if the indictments charge the omission of *corporate* dividends; this admission is highly significant and becomes very important upon the question of the granting of the writ in these cases.

Petitioners were deceived and misled by the holding of the court throughout the trial that the issue was one of law as to the meaning of the word "dividends" as defined by Congress in Section 115(a). Internal Revenue Code, which he would not decide until after the evidence was in (R. 89, 257, 259, 260, 261, 278, 279); petitioners gave up their right to a trial by jury when the District Attorney alleged in his Bill of Particulars that there was no evidence to show that any of the defendants had omitted corporate dividends from his return, and the holding of the trial court that the "dividend" charge in each indictment was a very material question upon the separate sub-

stantive charges, was highly deceptive to petitioners, and petitioners were thereby prejudicially deceived as to whether any evidence should be introduced by them. Petitioners claim that by the combination of all of these unusual circumstances which occurred at their trial, their several convictions upon the joint venture theory was a clear violation of rights guaranteed them by the Fifth and Sixth Amendments to the Constitution, and, in deciding otherwise, the Court of Appeals has unquestionably misconstrued and misapplied Rule 7(c) and Rule 52(a) of the Federal Rules of Criminal Procedure for the District Courts of the United States.

The argument of the Government on page 15 of its Brief that petitioners were not surprised nor misled is beyond the point. The fact that the District Attorney, in his answer to motions for bills of particulars, stated that the term "dividends" in the indictments was used to describe a division of profits from a joint venture, and not corporate dividends, could not change the indictments; it could not change the charge as laid in the indictments.

It cannot be treated *in the sense* that the indictments were changed or physically altered by striking therefrom a word fixed and defined by Congress and alleged by the Grand Jury as the essence of the crime, nor can the indictment be changed or altered by adding thereto dictionary meanings or words of common usage distinctly different from that fixed by Congress and used by the Grand Jury. *Edgerton* v. *United States,* 143 F. 2d 697 (9 C. A.); *Dodge* v. *United States,* 258 Fed. 300, 305 (2 C. A.), *Ex Parte Bain,* 121 U. S. 1, 13; *United States* v. *Norris,* 281 U. S. 619.

The Government does not answer petitioners' claim that the entire procedure in the trial court was prejudicial to their constitutional rights as set out in paragraph B, pages 17 and 18 of their Petition. Rule 52(a), Federal Rules of

Criminal Procedure for District Courts of the United States does not apply where prejudicial error to the defendants is affirmatively shown by the record as it is in these cases. *Kotteakos* v. *United States,* 328 U. S. 750; *Fiswick* v. *United States,* 329 U. S. 211.

Rule 52(a) cannot be used as a shield to protect the illegal procedure to which petitioners were subjected in the trial court:

(a) by a course of procedure which led them to surrender their right to a trial by jury upon questions of fact, which, for the first time, after the trial was closed, became controverted issues,

(b) by trying, and convicting them for the offense of omitting income from receipts of sales of whiskey in a joint venture, upon indictments which charged the omission of "dividends" and "capital gain",

(c) by trying them on different offenses and different indictments wrongfully consolidated,

(d) by receiving, and considering in evidence, against all of the defendants the several statements, made by the individual defendants long after the complete commission of all acts charged by the Government to have had relation to the alleged crimes, which did not conform to the Stipulation (Government's Exhibit Z),

(e) by receiving, and considering in evidence, the concededly incorrect Joint Venture and individual amended returns, prepared in conjunction with the Revenue Agents to effect a settlement, and for that purpose only, filed, on August 11, 1945, months after the first voluntary appearance of the defendants, and seventeen months after the last overt act alleged in the conspiracy indictment, which also was the act alleged to have been the crime in the substantive indictments,

(f) by attempting to sustain the convictions without evidence to support the charges as laid in the indictments and without having any definite theory upon which to predicate such conviction,

(g) and by convicting petitioners of having received dividends which were not reported, when the Government had stipulated with them that the money received and not reported was "gross receipts" to Rosenblum from the sale of liquor.

United States v. *Miro,* 69 F. 2d 58 (2d C. A.), and *United States* v. *Simmons,* 96 U. S. 360, cited on page 16 of the Government's brief, are not in point; the *Miro* case does not give consideration to indictments like ours which use words of statutory definition in defining and describing the manner and method in which the alleged offense was committed. In our cases, the gist of the offense charged is the alleged attempt to evade *in the manner* set out in the indictments.

This Court, in *United States* v. *Simmons, supra,* at page 363, very clearly points out that where a word of statutory definition is used in an indictment, such word is distinct and is used to advise the accused of the offense charged.

In our indictments, the Grand Jury used the word "Dividends" as it is defined by Section 115(a), Internal Revenue Code, for the purpose of advising the petitioners of the nature of the offense charged, and such indictments therefore allege a failure to report *corporate* dividends. Such allegation cannot be treated as surplusage.

The indictments in our cases alleged that the falsity in the tax returns consisted of omitting "Dividends" therefrom; all during the trial, the court held that this was a material allegation. The procedure in our cases was prejudicial, deceptive, and affected the substantial rights of petitioners. *Fiswick* v. *United States,* 329 U. S. 211; *Kotteakos* v. *United States,* 328 U. S. 750.

We urge that there has been a total failure of proof as to the charge laid in the several indictments; the Government abandoned the charge in the several indictments, and the Court based the convictions upon the bills of particulars;

the case of *Berger* v. *United States,* 295 U. S. 78, 82, cited on page 14 of the Government's brief does not decide the questions thus presented by our petitions. (Pet. 17, 18.)

The government evades the issues raised by the Petition and ignores the decisions of this Court which decide that no principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, are among the constitutional rights of every accused in a criminal proceeding in all courts, State or Federal. *Cole* v. *State of Arkansas,* 333 U. S. 196-201; *DeJonge* v. *State of Oregon,* 299 U. S. 353.

Question Two.

None of the matters referred to by the Government in its response to petitioners' Question Two shows that petitioners owed any tax; nor do they show that there was any proof at all of corpus delecti; the response of the Government tends to show nothing more than that Rosenblum had received gross income. This does not answer petitioners' claim that their costs and expenses of the whiskey sold must be deducted from gross receipts before they can be charged with having any net income; it does not answer their claim that they sustained a loss on the sales of liquor. (Pet. 19-20.)

The failure to sustain or attach any tax failure to petitioner Weiss is attempted to be bolstered by the Government by associating him with the others as their attorney in which capacity he handled funds for them as a fiduciary in a representative capacity. Not a scintilla of evidence is in the Record that he in any measure received income upon which he failed to pay the tax. That $126,000 *face* (not actual) value in stock of the Milwaukee Liquor Corporation was issued in his name merely as a bookkeeping

entry to straighten out the accounts payable on the books of that corporation (R. 144).

In any event, nobody was enriched by the issuance of this additional $126,000.00 face value stock. Petitioners owned all of the stock theretofore issued, they owned all of the stock after the issuance of the additional shares; 100% remains 100% ownership whether stated in 1 share or 1000 shares, of whatever face value.

The Court cannot permit a conviction to stand merely upon the suggestion of the Government that petitioners *believed* they had net income as stated by the Government in its brief on page 17. There must be evidence in the Record showing such tax, and such evidence must be independent from the statements made by the defendants upon that subject.

In its brief, the Government has taken the position that was adopted by the prosecution in *United States* v. *Fenwick,* Cause No. 9895, in the Seventh Circuit, decided on November 4, 1949 (not officially reported, but for convenience is set out as an appendix to this brief), of relying on admissions and extra-judicial statements of the defendants to establish corpus delicti. The Seventh Circuit, in the *Fenwick* case, very clearly decided that "the conviction cannot stand unless there is proof of the corpus delicti; existence of which cannot be presumed or established by an extrajudicial admission. The Government must, by competent evidence, prove beyond reasonable doubt that the crime charged has actually been committed. * * * In other words to justify the conviction, there must be proof beyond reasonable doubt and exclusive of any express or implied extrajudicial admission by defendant, that defendant evaded some income tax."

Measured by this present rule of the Seventh Circuit in the *Fenwick* case, and which is of course the law, we very

earnestly insist that the Government has wholly failed to respond to our Question Two. It has not shown that petitioners owed any tax which they did not pay. There is an utter failure of *independent* proof of "corpus delecti."

We believe that the statement in Government's brief on page 17, "all expenses which the investigating agents were able to find were allowed in determining net income" is clearly not justified by the Record. None of the Revenue Agents who took the witness stand—neither Johnson (R. 231-233), nor Ruggaber (R. 233-243, 245-247), nor Turner (R. 232-233)—testified, even remotely, regarding any expenses in any amount, to be allowed or disallowed. Witness Ruggaber's testimony was entirely hypothetical, and of probative value only, to the extent, that he indicated where the Government was in error in the assumptions in its hypothetical questions.

But, on page 17 of its brief, the Government says that the only evidence offered by the petitioners in proof of any additional costs was Government's Exhibits A-13 and A-14; these exhibits show petitioners' expenses; Defendant's Exhibit 6 shows the *cost* of the liquor. The Government further says on page 18 of its brief that it was incumbent upon the petitioners to prove any additional costs not reflected in their returns, and cites *Barrow* v. *United States*, 171 F. 2d 286 (C. A. 5th), to sustain its position; that the *Barrow* case has no application to ours, and that the trial court was, and the Government is, in error in stating that the burden was upon the petitioners to prove their costs, is shown by the decision of the Seventh Circuit in *United States* v. *Fenwick, supra,* where it is said:

> "Remembering that the government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circumstantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that,

> when the government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish tax evasion, the basic net worth must be established. The defendant is not compelled to take the witness stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all reasonable doubt."

There is no law that required the petitioners to show the costs and expenses had in connection with the purchase and sale of the liquor in question; costs and expenses are presumed when, as here, dealings are had in mercantile transactions, and the burden is at all times on the Government to show that such costs and expenses were less than the gross receipts. *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179.

The Government was not entitled to rely upon the costs reflected in petitioners' returns. *Forte* v. *United States*, 94 F. 2d 236 (C. A. D. C.); *Pines* v. *United States*, 123 F. 2d 825; *Gordnier* v. *United States*, 261 F. 910 (9 C. A.).

On page 18 of its brief, the Government says that even if Government Exhibits A-13 and A-14 constituted competent evidence, the Government was not bound by such evidence and the trial court was warranted in ignoring it; *United States* v. *Palese*, 133 F. 2d 600 (3 C. A.) and *United States* v. *Reginelli*, 133 F. 2d 595 (3 C. A.), are cited to support its position. Such cases do not sustain the Government as to such exhibits. Said cases relate to the right of a jury to accept that portion of the testimony of a witness which it deems credible and reject the remainder. But such rule does not apply to Exhibits A-13 and A-14; the court below could not take Exhibit A-12, which was the "boiled down" sheet prepared by Government's witness Richardson showing the "gross receipts" of the petitioners, and at the same time ignore A-14, which contained conclusively the uncontroverted statement of the expenses

of collecting and gathering the "gross receipts" shown on A-12; both A-12 and A-14 were given by petitioner Rosenblum at the same time and were put down by the Government witness Richardson, the accountant, and Government's Exhibit A-13 was prepared by Richardson in his own handwriting, and all three of these exhibits were part and parcel of the same transaction; the Government cannot introduce into the evidence Exhibit A-12, and rely thereon to show gross receipts, and at the same time identify for the Record and then "ignore" its Exhibits A-13 and A-14 which show the expenses of petitioners. The rule as applicable to our cases is succinctly stated by Professor Wigmore, Wigmore on Evidence, Second Edition, as follows:

> "The opponent, against whom a part of an utterance has been put in, may, in his turn, complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance * * * there is and could be no difference of opinion as to the *opponent's right*, if a part only has been put in, himself *to put in the remainder* * * *. This right of the opponent to put in the remainder is universally conceded, for every kind of utterance without distinction." Sec. 2113.
>
> "The principle as applied to writings permits the whole of the same document to be put in." Sec. 2116.
>
> "The same principle would apply *to another writing*, not expressly referred to, but *necessary* by the nature of the documents to a proper understanding of the one offered * * *." Sec. 2104.

Question Three.

On page 2 of Government's brief, it states a question as number three of the questions presented, "Whether the evidence was sufficient to sustain the conviction." Such statement does not approach the Question Three as presented by petitioners on page 15 of their Petition.

By its statement of the question and its argument there-

on, the Government begs Question Three as presented by petitioners in their Petition on page 15, summarized on pages 28 and 29 of their brief in support of said Petition, that the receipt in evidence of the hearsay statements of the several defendants, and their amended tax returns, all made long after the commission of all acts claimed by the Government to constitute the offenses charged, was prejudicial to the individual rights of each defendant in the substantive charges. The reversal by the Court of Appeals on the conspiracy indictments automatically rules out this mass of incompetent evidence which was admitted into the record solely because of the claim of conspiracy in the consolidated trial, and such evidence was not admissible on any theory as to either the substantive or the conspiracy charges.

The admission of the evidence of witnesses Ackerman, Hicks, Palffy and Siemion was clearly hearsay as to Weiss, and very prejudicial as to him.

The admission of Government's Exhibit X-1, transcript of statement of Mr. Rosenblum of March 21, 1944, was prejudicial as to Weiss and Stryk, and it was hearsay as to them.

Consequently, the cases cited by the Government on page 19 of its brief are not in point upon Question Three as presented by the petitioners.

The Government was and is estopped by its stipulation that the moneys alleged by it to have been omitted from the tax returns were "gross receipts", taken in by Rosenblum, from the sale of liquor, and it cannot now claim that such money was profit received by the Gary Wine and Liquor Corporation, as it has attempted to do on page 6 of its brief; and it is likewise estopped from using any part of the several extrajudicial statements of the petitioners which were not in conformity with said stipulation identified as Government's Exhibit Z.

Question Four.

The Government did not respond to that part of question four of petitioners (Pet. 15), nor to the reasons assigned for the granting of the writ on account thereof as set out on pages 22 and 23 of the petition, which, in paragraph A, page 22 of the petition, particularly points out that Rules 8 and 13, Federal Rules of Criminal Procedure, make the allegations on the face of the indictments the test by which consolidation shall be determined, and cite *McElroy* v. *United States,* 164 U. S. 67, *Castellini* v. *United States,* 64 F. 2d 636, Sixth Circuit, and *DeLuca* v. *United States,* 299 F. 741, Second Circuit, in support of this contention; this part of question four presents an important one of federal criminal procedure, and the decision of the Seventh Circuit in the instant cases is in conflict with the cases which we have cited.

The cases cited by the Government on page 20 of its brief, do not apply to the point which petitioners thus presented.

Paragraph B of question four (Pet. 22-23, 29) particularly shows how the petitioners were substantially prejudiced by the wrongful consolidation; the mass of hearsay statements and oral evidence which went in *solely* on the conspiracy charge was wrongfully considered by the trial court, and was largely the basis of his finding of guilt on the substantive indictments. Such result could not have happened except for the illegal consolidation; the reversal of the conviction on the conspiracy charge, *ipso facto* took out of the record this mass of incompetent, erroneously received, and prejudicially considered evidence, and it is evident that the judgment of the trial court was substantially swayed by such error, and it affirmatively appears that the substantial rights of the petitioners were prejudicially affected.

That the trial court was confused by the consolidation,

is partially evidenced by the fact that on page 279 of the Record he said he could not see how the defendants could be prejudiced by the Government's labeling the income as "dividends" or "profits of a joint venture", instead of merely labeling it as "other income", and that he was of the opinion that profits from a joint venture are not inaptly called dividends; this line of reasoning is inexplicable, as applied to the facts in our cases, as the Government and petitioners stipulated that the moneys claimed by the Government to have been omitted from the individual tax returns of the several defendants "were *gross* amounts received in cash by Louis H. Rosenblum in the transactions from purchasers" of liquor. (Government's Exhibit Z.) It is impossible to determine why the trial court was in confusion as to the nature of the moneys received, as the parties had stipulated that they were *gross receipts* to Rosenblum from the sale of liquor.

The procedure at the trial was so prejudicial that the Court of Appeals in reversing the conspiracy charge said the trial court could not differentiate between the proof relative to the various charges against the several petitioners (R. 399); he could not prevent the prejudice resulting to the substantial rights of the several petitioners which flowed from the wrongful admission of hearsay statements in the consolidated trials (R. 401).

Such prejudicial error having been shown, and no denial thereof or explanation therefor having been made by the Government, it clearly follows that the writ should be granted and the judgment of conviction reversed. *Fiswick* v. *United States,* 329 U. S. 211; *Kotteakos* v. *United States,* 328 U. S. 750.

As to "Statement" of Respondent.

The footnote on page 6 of the Government's brief says that petitioners failed to provide any of the exhibits admitted at the trial. On October 10, 1949, Hon. J. Earl Major, Chief Judge of the United States Court of Appeals for the Seventh Circuit, on application of counsel for the petitioners, "ordered that the clerk of this Court certify and transmit the original exhibits in this cause (9718-9721, 9719-9723, 9720-9722) to the Supreme Court of the United States". Petitioners had assumed this order had been complied with.

The Government, in relying upon the statement of facts in the Opinion of the Court of Appeals, has erroneously relied upon the references by Circuit Judge Kerner to the facts beginning on R. 392 and continuing through R. 397. These facts as recited by Judge Kerner were challenged by petitioners in their Petition for Rehearing in the Court of Appeals, with which challenge the Government did not take issue in its response in that Court. Judge Kerner's reference to the facts and the recitals and excerpts in that Opinion—now relied upon almost exclusively by the Government in its Brief in Opposition—are by Judge Kerner in discussion of the *conspiracy* charge, which subject he begins on R. 389 and continues through R. 397; almost every recital of fact therein comes from those witnesses or documents which were admitted *solely* upon the charge of conspiracy, the convictions on which charge were reversed by the Court of Appeals.

With the reversal of the conspiracy convictions every bit of evidence received on that charge went out of the Record. We think Circuit Judge Kerner was writing a dissenting opinion starting with the middle of Page 389 and continuing through Page 397 of the Record, and his recitals and excerpts quoted from were to sustain his position that the convictions on the conspiracy charge were proper, *but in doing so* he relied upon and recited almost exclusively from the very testimony which the majority of the Court of Appeals held was improperly received and considered

by the trial court, and one of the grounds, amongst others, upon which the conspiracy convictions were reversed.

It being apparent that the Government, in its Brief in Opposition herein, has relied upon such erroneous evidence, all of which went out of the Record with the reversal of the conspiracy charge, makes it unnecessary to further consider the "Statement" of the Government appearing on pages 4 to 13, inclusive, and the evidentiary matter discussed on pages 16 to 19 inclusive of its brief, in connection with the application for the writ.

By not further discussing the factual matters contained in such Statement of the Government, petitioners do not intend to admit that the Government has correctly stated such facts, but it is their position that a further consideration of such factual statements are not properly a part of the proceedings on petition for the writ, but should be treated by them fully on Review if the Petition for a Writ of Certiorari is granted.

Conclusion.

For all of the foregoing reasons, as well as those stated in the petition and original brief in support thereof, it is respectfully urged that the application of each petitioner for a writ of certiorari should be granted.

Dated: Indianapolis, Indiana,
November 17, 1949.

Respectfully submitted,

ALBERT WARD,
PALMER K. WARD,
318 Insurance Bldg.,
Indianapolis, Indiana,
WILLIAM B. HARRELL,
Republic Bank Bldg.,
Dallas, Texas,
Attorneys for Petitioners.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

November 4, 1949.

No. 9895.

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* HILLEN J. FENWICK, *Defendant-Appellant.*	Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

REVERSING AN UNREPORTED DECISION OF THE DISTRICT COURT.

[*Appeal from a Conviction of Fraud*]

Before MAJOR, Chief Judge, KERNER and LINDLEY, Circuit Judges.

LINDLEY, Circuit Judge: Defendant appeals from a judgment upon a verdict of a jury finding him guilty of wilfully attempting to defeat and evade a part of the income and victory tax due from him for the years 1943 and 1944.

Count 1 of the indictment charged that defendant, for 1943, made a false and fraudulent return in that he reported an income tax net income for the calendar year, of

$4,940.88, a victory tax net income of $6,040.94 and income and victory tax due of $907.50, whereas each of said incomes for the calendar year was $10,709.04, upon which he owed a total tax of $2,737.62. Count 2 charged that he falsely and fraudulently stated that his net income for 1944 was $5,677.58 and the tax due thereon $1,171.50, whereas his net income for the year was $22,198.87, upon which he owed a tax of $8,486.94.

[*Contentions of Parties*]

Upon appeal, defendant contends that the evidence was insufficient to establish his guilt, in that there was no proof of undisclosed source of income or of unreported taxable income from disclosed sources and no proof of defendant's net worth in 1943 and, therefore, no basis for establishment of increased net worth or expenditures in excess of reported income and, further, that, under the facts of the case, the increased net worth and expenditures method of proof is not properly applicable. The government insists that it has proved that defendant wilfully evaded payment of tax in each year by evidence that in each year defendant's net worth increased in an amount greater than his reported income and by evidence of expenditures in excess, as it says, of defendant's disclosed incomes.

[*No Evidence that Income Was Erroneously Stated*]

The tax return for each year was prepared by a deputy collector in accord with information supplied by defendant. At the trial, the government offered no evidence that the income reported was erroneously stated; nor did it question any of the deductions made by defendant. On the contrary, it relied entirely upon what it contends is sufficient evidence to establish an increase in net worth during each of these years in excess of the tax reported and expenditures in excess of reported income.

In such a situation we must keep in mind that the conviction can not stand unless there is proof of the *corpus delecti*, existence of which can not be presumed or established by an extrajudicial admission. The government must, by competent evidence, prove beyond reasonable doubt that the crime charged has actually been committed. *Pines* v. *United States*, Cir. 8, 123 Fed. (2d) 825, 829; *Forte* v. *United States*, CA-DC, 94 Fed. (2d) 236, 243; *Gordnier* v. *United States*, Cir. 9, 261 Fed. 910, 912; *United States* v. *Chapman*, 168 Fed. (2d) 997 at 1001. In the latter case we said: "Appellant contends that, 'In a net worth case, the starting point must be based upon a solid foundation and a Revenue Agent's statement of the defendant's oral admission or confession when uncorroborated is not sufficient to convict.' We fully agree with his statement of the law." In other words to justify the conviction, there must be proof beyond reasonable doubt and exclusive of any express or implied extrajudicial admission by defendant, that defendant evaded some income tax. *Gleckman* v. *United States*, Cir. 8, 80 Fed. (2d) 394, 399; *United States* v. *Miro*, Cir. 2, 60 Fed. (2d) 58, 61; *O'Brien* v. *United States*, Cir. 7, 51 Fed. (2d) 193, 196. Inasmuch as there is no direct proof that defendant received income which he did not report, we must test the validity of his conviction by the rules enunciated in the cases cited to determine whether there is such proof of increase in net worth, irrespective of defendant's implied admissions out of court, as to justify a finding of guilt. Such proof, circumstantial in character, in view of the principles announced, must be such as will exclude every reasonable hypothesis except that of guilt. Evidence of mere probability of guilt, of course, is not sufficient. Whether the proof meets these requirements necessitates some discussion of the evidence.

[*The Facts*]

From 1919 to 1947 defendant owned and operated a drugstore in Evansville, Indiana, and acquired from time to time pieces of real estate in the same city and a farm in an adjoining county. During 1943 and 1944, as well as for sometime previously thereto, he owned a number of coin-operated music boxes and amusement machines, which he placed in various restaurants and taverns for operation, the tenant and the owner dividing the net proceeds from the machines equally. His store, real estate and automatic machines afforded, according to the evidence, his only sources of income. Apparently he was a careless man, in so far as keeping records was concerned, as he kept no formal books of account but only invoices, memoranda, bills and checks. It was from such basic material and his own statements that the tax returns for 1943 and 1944 were prepared by the deputy collector. His return for 1943 showed that he had gross receipts of $55,280.21 and, after undisputed deductions, a net taxable income of $6,198.44 and a tax of $1,010.39 (including the unforgiven portion of 1942), which was paid. As we have indicated, there is no proof that any of the information furnished or any of the amounts reported was inaccurate or false. In fact the record is devoid of any direct evidence that defendant had any taxable income that he did not report.

Upon the theory that his worth had increased in each of the years, the government assumed that defendant's net worth on January 1, 1943 was $50,829.06. An experienced auditor in the employment of the government testified that this net worth, at the end of 1943, was $62,200.80. He assumed that the increase, $11,371.74, was taxable income received by defendant in 1943. His computation fixed defendant's net worth at the end of 1944 at $85,989.67, resulting in an increase in net worth of $22,228.87, which the witness said was taxable income received by defend-

ant in 1944. Upon the hypothesis that these computations were correct, a technical advisor of the Revenue Department computed defendant's tax for 1943 at $2,538.83 of which he had paid $1,010.39 and, in 1944, at $8,504.64 of which he had paid $1,171.50.

The weakness of the government's position, stressed by defendant, is the uncertainty of the propriety of the finding of defendant's net worth at the beginning of 1943. Of course, before the increased net worth method of proof is effective, the net worth of the taxpayer at the beginning of the tax year must be clearly and accurately established by competent evidence. *Bryan* v. *United States,* Cir. 5, 175 Fed. (2d) 223; *United Stotes* v. *Chapman,* Cir. 7, 168 Fed. (2d) 997, 1001; *United States* v. *Skidmore,* Cir. 7, 123 Fed. (2d) 604, 608. By this rule we must test the sufficiency of the evidence offered by the government to establish defendant's net worth at the beginning of 1943.

[*Insufficient Evidence Offered to Establish Taxpayer's Net Worth*]

The agent of the Revenue Department testified that he examined defendant's cancelled checks, bank statements and miscellaneous memoranda covering 1943 and 1944 and from them secured the information upon which he based his computation. He admitted that he found no discrepancy in the amounts received by defendants as income and the amounts returned. The government offered no direct testimony of unreported income items or of any undisclosed source of income.

The parties seem to be in no disagreement as to valuation of certain property owned by defendant, but there is no proof that the property admittedly owned by him at the beginning of 1943 constituted all assets he had at that date. There is no proof that he had not accumulated cash, or assets of other character over the 25 years during which

he had been engaged in business. The agent testified that defendant said that he received no gifts by inheritance in the five years 1940 to 1944 inclusive, and that he had no bank account, stocks or bonds or securities except those submitted. But defendant did tell the agent that he had been in business for 25 years and that in the five year period mentioned, he owned United States Savings bonds which he had cashed. There is no proof as to the amount of bonds defendant owned at the end of 1942, or of when they were cashed or whether they were cashed in 1943 and 1944. The agent testified that defendant had certain corporate stock but the prosecution offered no proof as to the amount owned by defendant in 1942 or whether any part or all of it was sold in 1943 or in 1944. The agent further testified that defendant said he had a $10,000 life insurance policy, but there is no proof of its value at the end of 1942 or as to whether it was surrendered or cashed in 1943 and 1944. The agent said on cross-examination that he had made no inquiry of defendant as to whether he had cash on hand accumulated from earnings from his business in the years prior thereto. When counsel for defendant objected that the agent merely assumed that the assets he had enumerated were the defendant's only assets at the beginning of 1943, the United States Attorney remarked that there might have been other assets. In other words, the evidence falls far short of proof that the property which the government agents assumed constituted all of defendant's net worth at the beginning of 1943, was in fact all of the property then owned by him. And, in determining net worth and expenditures, the government took no account of unquestioned deductions for depreciation and depletion, amounting, in 1943, to $7,255.63 and, in 1944 to $9,389.44 and accumulated over the years to $34,464.41. These deductions, though authorized by law, were in their essence money which defendant might legiti-

mately and advantageously have expended for new assets of other character, thus increasing his net worth from a legitimate source.

As we have said, when the government relies upon the circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion it must produce evidence that excludes all possible available sources of taxable income from which the increased net worth and the excess expenditures could have been derived. Thus in *Bryan* v. *United States,* Cir. 5, 175 Fed. (2d) 223, the court said: "The net worth-expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate. Since * * * no claim of evasion is based upon the deductions from gross income reported by the defendant, and since there is no evidence that the gross expenditures by the defendant in any year were made entirely from gross income of the business operations in such year, it was essential for the government to present evidence that excluded, or tended to exclude, all other available sources from which the additional funds expended could have been derived. If the defendant correctly reported his gross income, then a very substantial part of the expenditures was obliged to have been made from funds other than such current income and from sources not covered by the returns or the records of the defendant or included by the government's computation of net worth. * * * the Government must rely almost entirely upon circumstantial evidence, that is to say, upon the circumstance of the expenditure of considerably more money in the years in question than the defendant took in. * * * The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the defendant. * * * the case should not

have been submitted to the jury, since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income." This is in accord with the decision of this court in *United States* v. *Chapman,* Cir. 7, 168 Fed. (2d) 997, 1001.

[*Conclusion*]

Remembering that the government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circumstantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that, when the government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established. The defendant is not compelled to take the witness stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all reasonable doubt, and where there is uncertainty as to whether all the assets of defendant are included in the government's computation of net worth, it follows that its computations can not be relied on. Essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt.

The judgment is Reversed.